

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, and Notices  
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and  
U.S. Court of International Trade**

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## **NOTICE**

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# United States Court of International Trade

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# Decisions of the United States Court of International Trade

(Slip Op. 93-143)

UNITED STEELWORKERS OF AMERICA, AND ITS LOCALS 4889, 5030,  
5092, AND 5116, PLAINTIFFS *v.* SECRETARY OF LABOR, DEFENDANT

Court No. 91-12-00856

[Department of Labor Determination Sustained.]

(Decided August 2, 1993)

*United Steelworkers of America (Mary-Win O'Brien)* for plaintiffs.  
Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Marc E. Montalbine*), *Annaliese Impink*, Office of the Solicitor, United States Department of Labor, of counsel, for defendant.

## OPINION

RESTANI, Judge: This action is before the court on the plaintiffs' motion for judgment on the agency record. Plaintiffs, United Steelworkers of America and its Locals 4889, 5030, 5092 and 5116 (collectively "USWA"), contest the decision of the Department of Labor ("Labor"), which denied trade adjustment assistance benefits to pipe mill workers separated from the United States Steel Corporation, Fairless Works, in Fairless Hills, Pennsylvania ("Fairless"). The question to be decided is whether Labor's determination is based on substantial evidence. For the reasons that follow, the determination is sustained.

## ADMINISTRATIVE PROCEEDINGS

Fairless is a steel plant that produced semi-finished slab, finished flat roll and finished pipe products. Fairless workers are separately identifiable by the product on which they work. Slab steel production and some flat roll steel production ceased in February 1991; pipe mill production was discontinued on August 8, 1991. On June 17, 1991, USWA filed a petition on behalf of Fairless employees seeking trade adjustment assistance benefits pursuant to 19 U.S.C. § 2271 (1988).

Following its investigation, Labor found that Fairless' production of semi-finished slab, flat roll and pipe products declined in 1990 compared to 1989, and in the first quarter of 1991 compared to the same period in 1990 (hereinafter "review period"). Further, the United States aggre-

gate imports of these products generally increased during the review period. Labor concluded, however, that increased imports of slab, flat roll or pipe products "did not contribute importantly to worker separations at the firm."<sup>1</sup> 56 Fed. Reg. 50,949 (Oct. 9, 1991). On October 9, 1991, Labor issued a negative determination as to the workers' eligibility to apply for trade adjustment assistance. *Id.*

Plaintiffs sought review of that decision. On June 2, 1992, the parties voluntarily agreed to a remand determination. On reconsideration, Labor found that Fairless customers significantly replaced slab and flat roll purchases with imports. Labor, however, concluded that imports had not significantly replaced Fairless pipe purchases and thus did not contribute importantly to the separation of the pipe mill workers.<sup>2</sup> On November 16, 1992, Labor reversed its negative determination as to all affected employees except those engaged in pipe production. 57 Fed. Reg. 55,282 (Nov. 24, 1992). Plaintiffs appeal Labor's negative determination as to the pipe mill workers.<sup>3</sup>

#### STANDARD OF REVIEW

A decision by Labor to deny certification of eligibility for trade adjustment assistance benefits will be upheld if it is supported by substantial evidence in the record and otherwise in accordance with law. *Former Employees of Gen. Elec. Corp. v. Department of Labor*, 14 CIT 608, 611 (1990).

#### DISCUSSION

A group of workers shall be certified as eligible to apply for trade adjustment assistance if the Secretary of Labor determines:

- (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
- (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
- (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

<sup>1</sup> To determine whether increased pipe imports contributed to the separation of pipe mill workers, Labor surveyed eight of eleven major customers Fairless listed as having significantly decreased pipe purchases during the review period. In its investigation, Labor erroneously concluded that "none of the [customers] reported increasing their purchases of imported finished pipe products during the period under investigation." Public Record, at 19, 54. The record, in fact, reveals that one customer reported a small increase in purchases of imports from the first quarter of 1990 to the first quarter of 1991.

<sup>2</sup> On remand, Labor completed its investigation of the three customers not surveyed in the original investigation. Two customers reported no import purchases of pipe, and the remaining customer was not surveyed because it had increased its purchases of pipe products from Fairless during the review period. Thus, of the ten customers surveyed for the review period, seven customers had no purchases of imported pipe, two decreased purchases of imported pipe, and one insignificantly increased its purchases of imports.

<sup>3</sup> Plaintiffs do not challenge Labor's method of investigation, in this case customer surveys, only its conclusions.

19 U.S.C. § 2272 (1988) (emphasis added). The term "contributed importantly" is defined as "a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1). Congress, however, intended that "[a] cause \*\*\* be significantly more than *de minimis* to have contributed importantly." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 133, reprinted in 1974 U.S.C.C.A.N. 7186, 7275; see *Finkel v. Donovan*, 9 CIT 374, 382, 614 F. Supp. 1245, 1251 (1985). Further, an important aspect of the "contributed importantly" test is whether the subject company's customers shifted their purchases to imports.<sup>4</sup> A causal nexus must be established between the separation of workers and increased imports; thus, there must be a direct and substantial relationship between the increase in imports and the decline in sales and production. See *Retail Clerks Int'l Union v. Donovan*, 10 CIT 308, 311 (1986).

Plaintiffs argue that of the ten customers surveyed, two customers, which accounted for a significant decrease in Fairless' sales, "increased imports relatively or absolutely" from the first quarter of 1990 to the first quarter of 1991, thus contributing importantly to the separation of workers. The court will consider the evidence with regard to each customer in turn.

The record indicates that the first customer reported a small increase in import purchases from the first quarter of 1990 to the first quarter of 1991. The increased import purchases, however, accounted for only an insignificant percentage of the total decline in the customer's purchases from Fairless. Thus, imports likely did not significantly or substantially replace Fairless purchases, and it is more probable that sales were lost to domestic competitors or there was simply a reduction in the customer's overall pipe purchases. Moreover, the customer stated that the import purchases consisted of products that Fairless either did not make or could not supply. Plaintiffs contend, however, that some import purchases were products Fairless manufactured, but could not supply only because pipe production was decreasing. Nevertheless, the decline in Fairless' sales and production must be directly and substantially related to the import purchases. See *id.* The record does not support a finding that imports significantly replaced Fairless purchases.

The second customer, which significantly reduced purchases from Fairless, also significantly reduced import purchases during the review period. Plaintiffs contend that since the decrease in purchases from Fairless exceeded the decrease in purchases of imports, the customer "relatively" increased its purchases of imports. This fact alone, however, does not demonstrate a causal nexus between the import purchases and separation of workers. There is no indication in the record of an increased reliance on imports that directly contributed to Fairless'

<sup>4</sup> Labor often employs what is known as the "dual test": Did customers reduce purchases from the subject company and increase purchases of imports? Although this court recognizes that this is "not a very sophisticated test," it is a reasonable means of ascertaining a causal link between imports and worker separations. See *Finkel*, 9 CIT at 381, 614 F. Supp. at 1250; *United Glass and Ceramic Workers v. Marshall*, 584 F.2d 398, 40506 (D.C. Cir. 1978).

declining sales. Rather, the record reveals that the customer reduced its purchases of steel pipe from all sources, consequently imports did not substantially replace purchases from Fairless.

In summary, the evidence cited by plaintiffs does not support a finding that increased imports were significantly more than *de minimis* so as to contribute importantly to the separation of workers. Thus, this court finds Labor's negative determination to be supported by substantial evidence.

Plaintiffs additionally argue that in light of the remedial purposes of the Trade Act of 1974, Labor erred in drawing conclusions from the record "in a manner intended to deny benefits, when the evidence can also be analyzed to support a finding of eligibility." Plaintiffs' Brief, at 2. This argument is without merit. It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 16 CIT \_\_\_, 788 F. Supp. 1216, 1217 (1992) (quoting *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990)). As there is no specific evidence of bias and as Labor's determination is supported by substantial evidence, this court declines to draw a different conclusion from the record.

#### CONCLUSION

Increased imports did not contribute importantly to Fairless' decline in sales and the resultant separation of workers. The majority of Fairless' customers did not purchase any imports of steel pipe during the review period. Of the customers that did purchase imports, it was not shown that the imports significantly replaced Fairless purchases.

In light of the foregoing, this court finds that Labor's negative determination is based on substantial evidence. Plaintiffs' motion for judgment on the record is denied, and Labor's determination is sustained.

(Slip Op. 93-144)

SURAMERICA DE ALEACIONES LAMINADAS, C.A., CONDUCTORES DE ALUMINIO DEL CARONI, C.A., INDUSTRIA DE CONDUCTORES ELECTRICOS, C.A., AND CORPORACION VENEZOLANA DE GUAYANA, PLAINTIFF *v.* UNITED STATES, U.S. INTERNATIONAL TRADE COMMISSION, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND SOUTHWIRE CO., DEFENDANT-INTERVENOR

Court No. 88-09-00726

[The decision of the ITC rescinding its original finding of threat of injury is affirmed.]

(Decided August 4, 1993)

*Arnold & Porter* (Patrick F.J. Macrory, Michael Faber, Claire E. Reade, Edward Sisson); *Shearman & Sterling* (Thomas B. Wilner, Jeffrey M. Winton) for plaintiffs.

*Frank W. Hunger*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*M. Martha Ries Michael S. Kane*); *Lyn M. Schlitt*, General Counsel, United States International Trade Commission; *James A. Toupin*, Assistant General Counsel, United States International Trade Commission (*Stephen A. McLaughlin, Carol McCue Verratti*); *Robert H. Brumley*, General Counsel, U.S. Department of Commerce for defendants.

*Wigman, Cohen, Leitner & Myers, P.C.* (*Victor M. Wigman, Ralph C. Patrick, Dorothy H. Patterson*); *McKenna, Conner & Cuneo* (*Peter Buck Feller, Lawrence J. Bogard*) for defendant-intervenor.

*Baker & McKenzie* (*William D. Outman II, Arthur L. George*) for General Electric Co., *Amicus Curiae* in support of plaintiffs.

#### MEMORANDUM OPINION

**MUSGRAVE, Judge:** This Court, by Slip Op. 93-35, remanded the above-captioned matter to the International Trade Commission ("ITC") for additional explanations of its affirmative finding of threat of injury by reason of imports of Venezuelan aluminum electrical conductor rod ("EC rod"). This remand was necessary, as the finding of threat was not supported by substantial evidence. This Court suggested that if the ITC could not provide the required evidence based on the record, the ITC could rescind its finding of a threat of injury. This was not an order, but merely an option which was suggested inasmuch as sufficient evidence had not been introduced. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, Slip Op. 93-35, and accompanying Order at 2 (March 15, 1993). The parties then had the opportunity to comment on the ITC's remand findings.

The ITC rescinded its finding of threat in its remand results dated June 2, 1993. Unfortunately, rather than providing the Court with the necessary evidence, if any, in the record to substantiate the ITC's findings, the ITC report attributed to this Court a practice of applying erroneous legal standards and of robbing the Commission of its authority and discretion. On its face, this intransigence suggests the substitution of bluster for the missing evidence.

According to the statute, the agency final determination in antidumping and countervailing duty administrative reviews must be sustained

unless they are unsupported by substantial evidence or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B).<sup>1</sup> As the Court of Appeals for the Federal Circuit ("CAFC") recognized in its decision to deny defendant and defendant-intervenor's interlocutory appeal in this matter, this Court remanded this case to the ITC to allow further explanation of whether and how the evidence supports the ITC's factual findings and to permit consideration of additional evidence. *See CAFC Order* at 12 (May 26, 1993) (denying interlocutory appeal from Slip Op. 93-67 of the CIT). Moreover, the CAFC noted that as this Court phrased it, "[i]f the [ITC] can find support in the record for its determination, it may make whatever determination on remand its discretion allows." *CAFC Order* at 3.

Rather than abrogating its statutory duty as defendant contends, the Court was compelled, in light of the absence of supporting evidence, by its statutory duty to require further explanations before sustaining the ITCs original finding – which was not otherwise based on substantial evidence. The Commission declined to even attempt to find such supporting evidence suggesting there is none to produce. As the CAFC itself has warned, "[e]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion'." *Ipsco, Inc. v. U.S.*, 8 Fed. Cir.(T) 80, 83, 899 F.2d 1192, 1195 (Fed. Cir. 1990), quoting *Motor Vehicle Mut. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S.Ct. 2856, 2869, 77 L. Ed.2d 443 (1983) (citations omitted).

The reasons for the decision to remand this matter for further findings and explanations are adequately set forth in the prior rulings of this Court, Slip Op. 93-35 and Slip Op. 93-67. Of particular concern to the Court was the Commission majority's tenacity in prosecuting this matter despite the lack of emphasis or attention paid to the threat argument by petitioner, the lack of support for the petition in the industry, and petitioner's failure even to mention the purported threat from Venezuelan imports in an SEC registration statement filed after the petition.<sup>2</sup> Now, instead of attempting to bring to light any of the evidence the Court requested to support the ITC's original threat findings, the majority merely invokes an omnipotent standard of discretion.

For the foregoing reasons, this Court finds that the ITC's rescission of the original threat finding was proper and is hereby affirmed. This case is dismissed.

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<sup>1</sup> The agencies use this language invariably as a talisman, seeking endorsement by the Court of whatever action is taken.

<sup>2</sup> This circumstance of petitioner's filing contradictory and conflicting documents with two different agencies of the U.S. government raises serious questions of petitioner's candor, veracity, and ethical conduct.

(Slip Op. 93-145)

WIN-TEX PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND  
MILLIKEN & CO., INC., DEFENDANT-INTERVENOR

Court No. 92-04-00302 (BN)

*Appearances:**Adduci, Mastriani, Schaumberg & Schill (Ralph H. Sheppard, Barbara A. Murphy, and Robert J. Leo, Esqs.)*, for plaintiff.*Frank W. Hunger*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, Department of Justice (Jeffrey M. Telep, Attorney); *J.C. Lowe*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.*Wilmer, Cutler & Pickering (John D. Greenwald, Ronald I. Meltzer, Bahram A. Zia, Esqs.)* for defendant-intervenor.

(Dated August 5, 1993.)

[Remanded to International Trade Administration.]

## OPINION AND ORDER

## INTRODUCTION

*NEWMAN, Senior Judge:* In this action, commenced pursuant to 28 U.S.C. § 1581(c), 19 U.S.C. § 1516a(a)(2)(A)(ii) and 19 U.S.C. § 1516a(a)(2)(B)(vi), plaintiff seeks to overturn the antidumping duty Final Scope Ruling of March 31, 1992 by the International Trade Administration, United States Department of Commerce ("ITA" or "Commerce"); *Final Scope Ruling on the Request By Win-Tex Products, Inc. for Clarification of the Scope of the Antidumping Duty Order on Shop Towels of Cotton From the People's Republic of China* ("Final Scope Ruling"). By its Final Scope Ruling, ITA determined that plaintiff's cotton shop towels imported from Honduras are within the scope of *Shop Towels of Cotton From the People's Republic of China; Antidumping Duty Order*, 48 Fed. Reg. 45,277 (October 4, 1983) ("Order").

Currently before me is plaintiff's motion under CIT Rule 56.2 for judgment upon the agency record that ITA's Final Scope Ruling is unsupported by substantial evidence on the record or is otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B). The relief sought by plaintiff is either the reversal of ITA's Scope Ruling and judgment on the existing record that plaintiff's shop towels from Honduras are not within the scope of the Order, or alternatively, a remand of the action to the agency with instructions to conduct a scope inquiry under 19 C.F.R. § 353.29(f), or alternatively, apply the scope criteria in 19 C.F.R. § 353.29(i)(2).

For the reasons that follow, this case is remanded to ITA for further proceedings, as specified below.

## BACKGROUND

On March 12, 1991, plaintiff filed an application with Commerce for a scope determination that plaintiff's shop towels from Honduras are not

within the scope of the Order. Briefly, at ITA plaintiff argued for a scope ruling under 19 C.F.R. § 353.29(f), covering merchandise "completed or assembled" in a third country. As the basis for its contention that plaintiff's shop towels are "completed or assembled" in Honduras and excluded from the scope of the Order, plaintiff maintained before ITA, and argues here, that Chinese cotton greige fabric undergoes substantial manufacturing and finishing operations in Honduras resulting in a change in commercial identity of the Chinese fabric into finished or completed towels with significant added value, and that the towels completed in Honduras are not of the same class or kind as those covered by the Order because the product from Honduras is packaged and intended for marketing at the retail level of trade for home use, rather than sold to industrial users.

On March 31, 1992, after conducting a scope inquiry in accordance with 19 C.F.R. § 353(i)(1) rather than under § 353.29(f), as requested by plaintiff, ITA issued the Final Scope Ruling that plaintiff's shop towels from Honduras are within the scope of the Order. In an unpublished memorandum explaining its determination, ITA: (1) declined to conduct the scope inquiry pursuant to 19 C.F.R. § 353.29(f), finding that Win-Tex conducts only minimal processing in Honduras and hence its shop towels are not "completed or assembled" in a third country; (2) conducted the scope inquiry under 19 C.F.R. § 353.29(i)(1), finding that the description of the shop towels covered by the Order is "dispositive"; and (3) declined to conduct further inquiry pursuant to the criteria in § 353.29(i)(2).

#### DISCUSSION

*Plaintiff's claim that its shop towels are "completed or assembled" in Honduras, and therefore, 19 C.F.R. § 353.29(f) is applicable:*

As noted above, in the Final Scope Ruling, ITA found that Win-Tex does not qualify for a scope review analysis under 19 C.F.R. § 353.29(f), which regulation (following 19 U.S.C. § 1677j(b)) provides certain criteria specifically applicable to products "completed or assembled" in a third country, and is intended to prevent circumvention of antidumping duty orders through third country operations.

In declining to conduct the scope inquiry under 19 C.F.R. § 353.29(f), as requested by plaintiff, ITA relied on the legislative history underlying the corresponding statutory provision, 19 U.S.C. § 1677j(b), pursuant to which the regulation was promulgated. Citing S. 490, S. Rep. No. 71, 100th Cong., 1st Sess. 99-101 (1987), ITA concluded that 19 U.S.C. § 1677j(b) does not apply to plaintiff's Honduras shop towel operations since plaintiff's "products imported into Honduras did not consist of parts or components, or of unfinished products being completed or assembled in that third country." Adm. Rec. 14 at 5. ITA also relied on 19 U.S.C. § 1677b(f) and agency precedents, explaining that, unless merchandise shipped through a third country is "substantially transformed prior to importation into the United States," such merchandise "may be determined to be within the scope of an existing antidumping

duty order." Adm. Rec. 14 at 5-6. ITA reviewed Win-Tex's evidence regarding the additional operations performed in Honduras and concluded that "the Honduran shipments do not enter the commerce of Honduras," and "[u]pon examination, we do not regard \*\*\* desizing, dying [sic], washing, drying, sorting and packaging" as constituting substantial transformation." Adm. Rec. 14 at 6 (quoting Win-Tex Request for Scope Determination at 15).

Plaintiff insists that its shop towels are "completed" in Honduras, and thus ITA was required, but failed, to apply the analysis for determining circumvention as set out in 19 U.S.C. § 1677j(b) and 19 C.F.R. § 353.29(f). Plaintiff further argues, and defendant does not dispute, that where the requisite third country processing exists, the circumvention criteria in 19 U.S.C. § 1677j(b) and 19 C.F.R. § 353.29(f) preempt other lines of scope inquiry.

As administrative precedent for a scope analysis under 19 C.F.R. § 353.29(f) and exclusion of its shop towels from the scope of the Order, Win-Tex called ITA's and the court's attention to a prior unpublished scope ruling involving shop towels from the PRC: *Final Scope Ruling on the Request of Able Textile Corporation for Clarification of the Scope of the Antidumping Duty Order on Shop Towels of Cotton from the Peoples' Republic of China* (August 21, 1990) ("Able Textile"). Plaintiff insists that ITA erred in failing to follow the *Able Textile* analysis as precedential in the scope ruling regarding plaintiff's shop towels. Defendant contends that *Able Textile* is distinguishable on its facts from the present case.

There can be little question that as administrative precedent for a scope inquiry pursuant to § 353.29(f) on the basis of third country completion or assembly of shop towels and exclusion of the towels from the Order, *Able Textile* is pivotal to the present scope controversy.

In *Able Textile*, bolts or bales of cotton fabric (continuous length uncut and unhemmed material) imported into Canada from China were processed into shop towels by cutting to size, stitching the unfinished edges, stamp labelling and folding and packing for shipment to the United States. The Canadian processing, ITA found, resulted in a substantial value added to the Chinese fabric (45 percent of the selling price to the United States). ITA determined that Able Textile's shop towels were "assembled" in Canada within the purview of 19 U.S.C. § 1677j(b) and 19 C.F.R. § 353.29(f) and excluded from the Order because of the substantial value added by the Canadian manufacturing operations and the absence of any necessity for inclusion of Able Textile's shop towels in the order to prevent evasion.

As contrasted with Able Textile's continuous length bolts or bales of cotton fabric from China, which required *inter alia* cutting to size and shape and hemming in Canada, ITA found that most of the Win-Tex goods shipped from the PRC and imported into Honduras were pre-cut to size and hemmed fabric pieces that had the physical characteristics of already completed shop towels within the scope of the Order. The fore-

going finding was based in part on Win-Tex' scope request itself stating that its Chinese fabric arrives in Honduras "principally \*\*\* cut to shape and usually hemmed." Adm. Rec. 6 at 3-4. ITA also placed great significance on the fact that Win-Tex reported the cost of the Chinese fabric component of its shop towels imported into Honduras on a per dozen *towels* basis.

Plaintiff nonetheless maintains that ITA should have considered the pre-cut and hemmed fabric pieces as "finished" in Honduras by plaintiff's additional Honduran processing, and consequently as "completed or assembled" in a third country. Moreover, argues plaintiff, ITA failed to consider plaintiff's additional information in its Request for Scope Review that some of plaintiff's Chinese fabric is imported into Honduras in continuous length and is cut and/or hemmed in Honduras.

ITA reasonably concluded that its *Able Textile* determination is not precedential relative to plaintiff's pre-cut to size and hemmed pieces of fabric from the PRC imported into Honduras which already possessed the essential physical characteristics of the shop towels covered by the Order. ITA also reasonably interpreted the language "completed or assembled" in the statute and regulation in holding that the pre-cut and hemmed pieces of fabric are already completed shop towels upon importation into Honduras.

Fundamentally, of course, in determining whether ITA acted reasonably and in accordance with law, the court must substantial deference to the agency's interpretation of the statute that it administers. *Zenith Elec. Corp. v. United States*, 988 F. 2d 1573 (Fed. Cir. 1993) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)); *Suramerica de Aleaciones Laminada, C.A. v. United States*, 966 F. 2d 660, 665 (Fed. Cir. 1992); *American Lamb Co. v. United States*, 785 F. 2d 994, 1001 (Fed. Cir. 1986).<sup>1</sup>

In sum, with regard to Win-Tex's pre-cut and hemmed shop towels imported into Honduras, ITA correctly found they were not "completed or assembled" in a third country and properly declined to conduct its scope inquiry pursuant to 19 C.F.R. § 353.29(f).

Unfortunately and inexplicably, however, ITA failed to address the continuous length fabric that plaintiff disclosed in its request for a scope ruling is cut to size and/or hemmed in Honduras. Plaintiff complains that it factually pointed out to ITA that some of its Chinese osnaburg fabric is imported into Honduras in uncut, continuous lengths, but ITA failed to rule on those goods.

Plaintiff insists, and I agree, that ITA should have considered whether plaintiff's cut but unhemmed (unfinished) pieces of fabric and/or the uncut and unhemmed continuous length fabric imported into

<sup>1</sup> Defendant calls attention to *Smith Corona Corp. v. United States*, 811 F. Supp. 692, 695 (CIT 1993), approving Commerce's reliance on substantial transformation "[i]n determining if merchandise exported from an intermediate country is nonetheless covered by an antidumping order." However, I also note that *American NTN Bearing Mfg. Corp. v. United States*, 739 F. Supp. 1555, 1565 (CIT 1990)) holds: "In the context of determining the scope of an antidumping duty order, 'substantial transformation' has little significance."

Honduras fall within the *Able Textile* rationale.<sup>2</sup> See *Nakajima All Co. v. United States*, 744 F. Supp. 1168 (CIT 1990). Remand for ITA's initial consideration and views as to the foregoing categories of merchandise is clearly warranted.

*Plaintiff's claim that ITA erred in finding the merchandise descriptions "dispositive" and refusing to consider the Diversified Products criteria:*

Having declined to apply 19 C.F.R. § 353.29(f) in this case, as requested by plaintiff, ITA made its Final Scope Ruling pursuant to § 353.29(i)(1) finding that, on the basis of the physical characteristics of plaintiff's towels, "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary and the Commission" are "dispositive." *Id.* However, § 353.29(i)(2) goes on to provide that "[w]hen the above criteria [merchandise descriptions] are not dispositive, the Secretary will further consider" the additional criteria provided in 19 C.F.R. § 353.29(i)(2)(i)–(iv), which include: (i) the physical characteristics of the product; (ii) the expectations of the ultimate purchaser; (iii) the ultimate use of the product; and (iv) the channels of trade. The forgoing are commonly referred to as the "Diversified Products" criteria, named after the decision in *Diversified Products Corp. v. United States*, 572 F. Supp. 883 (CIT 1983).

I agree with plaintiff's contention that the descriptions of the merchandise are not "dispositive," and therefore ITA erred in refusing to apply the *Diversified Products* criteria in § 353.29(i)(2)(i)–(iv). Plaintiff correctly points up that the descriptions of shop towels contained in ITA's preliminary and final determinations and the Order describe the covered merchandise as "shop towels of cotton from the People's Republic of China, which are currently classified under item number 366.2740 of the Tariff Schedules of the United States Annotated." 48 Fed. Reg. 45,277; 48 Fed. Reg. 12,764; 48 Fed. Reg. 37,055 (emphasis added). That referenced tariff classification embraces shop towels "dedicated to use in garages, filling stations and machine shops." The notice of initiation repeats this TSUS reference and in addition to describing the physical characteristics of shop towels, stresses their *use* in industrial and commercial facilities. 47 Fed. Reg. 41,149. Similarly, the ITC report describes the merchandise under investigation as "industrial wiping cloths used primarily for wiping machine parts and cleaning away ink, grease, oil, or other unwanted substances." According to ITC, "shop towels are usually purchased by industrial laundries, which, in turn rent them to commercial and industrial establishments. \* \* \* Shop towels are classified under item 366.2740 of the [TSUS.]" Adm. Rec. 3.

<sup>2</sup> Defendant's sole argument as this category of merchandise is that plaintiff failed to attach to its request "any factual support" for its position in conformance with § 353.29(b)(2)(iii). Whatever the merits of such procedural argument had it been the expressed reasoning of the agency, here it is simply *post hoc* rationale by counsel that may not be attributed to the agency which chose not to discuss plaintiff's uncut and/or unhemmed fabric imported into Honduras.

Plainly, and as strenuously urged by plaintiff, an ambiguity exists in the description of the merchandise concerning the scope of the Order as to whether shop towels that are *not* dedicated to use in the industrial settings specified in the TSUS, but rather are used in the household, are included in the Order. Therefore, I must agree with plaintiff that the "descriptions of the merchandise" within the purview of § 353.29(i)(1) are "not dispositive," within the meaning of § 353.29(i)(2), and hence, ITA should have made a full analysis following the *Diversified Products* criteria.

Notwithstanding ITA's references to industrial and commercial use of shop towels in the description of the merchandise and reference to the TSUS classification for shop towels "dedicated to use in garages, filling stations and machine shops," defendant argues that the description of the merchandise is "dispositive" within the purview of § 353.29(i)(1). These references and the household use of plaintiff's towels are blandly dismissed by defendant as simply irrelevant to the scope of the Order.

It is recognized that in describing the merchandise, ITA may deviate from tariff classifications, *Royal Business Machines v. United States*, 507 F. Supp. 1007, 1014 n. 18 (CIT 1980), *aff'd*, 669 F. 2d 692 (Fed. Cir. 1982); that ITA has broad discretion in scope determinations, *Mitsubishi Elec. Corp. v. United States*, 898 F. 2d 1577, 1583 (Fed. Cir. 1990), *Gold Star Co. v. United States*, 692 F. Supp. 1382 (CIT 1988), *aff'd sub nom.*, *Samsung Elec. Co. v. United States*, 873 F. 2d 1422 (Fed. Cir. 1989); and that reference to a specific tariff classification in the description of the merchandise in an order may be merely for administrative convenience or otherwise not intended to be conclusive as to the intended scope of the order. *Nitta Industries Corp. v. United States*, Appeal No. 92-1393 (Fed. Cir. June 30, 1993); *Smith Corona Corp. v. United States*, 915 F.2d 683, 686-87 (Fed. Cir. 1990). Nevertheless, since the descriptions of the merchandise in question utilize the TSUS tariff classification for shop towels dedicated for use in garages, filling stations and machine shops (with no qualification that the TSUS description is merely for convenience) and the descriptions otherwise stress the industrial end the shop towels covered by the investigation and Order as those used for removing grease, oil, ink, etc., such descriptions may hardly be regarded as a "dispositive" description of plaintiff's towels sold only in retail channels of trade for household use. See *Mitsubishi Electric Corp. v. United States*, 802 F. Supp. 455, 462 (CIT 1992), *appeal docketed*, No. 93-1212 (Fed. Cir. 1993).

Under the facts and circumstances of this case, I am bound to reject defendant's position that consideration of the *Diversified Products* criteria is unnecessary. Accordingly, in its scope determination ITA should have considered, in addition to the physical characteristics of the merchandise, the use of the Win-Tex merchandise in the household, its retail channels of trade, and the expectation of the ultimate purchaser of the Win-Tex towels to use them for household cleaning. See *Mitsubishi*, 802 F. Supp. at 462.

As illustrated by the following cases, the description of the merchandise may make a product's end use critical to the scope of an antidumping order. *IPSCO, Inc. v. United States*, 715 F. Supp. 1104 (CIT 1989) (pipe "intended for use in drilling for oil and gas"); and *Mitsubishi, supra* (scope of an order turned on the issue of dedication to an exclusive use).

Defendant attempts to distinguish *Mitsubishi* on the ground that there, in describing the merchandise, Commerce itself used the phrase "dedicated exclusively for use" and did not, as in the instant case, simply advert to a tariff classification based on dedication to use. However, in either case, the scope of the order with reference to the use of the product may be ambiguous or unclear and warrant additional findings under the *Diversified Products* analysis. *See also Kyowa Gas Chemical Industry Co., Ltd. v. United States*, 582 F. Supp. 887 (CIT 1984).

Prior to the publication of § 353.29(i)(2), March 9, 1990, under which ITA explicitly "will \* \* \* consider" in scope proceedings the four *Diversified Products* criteria listed if the descriptions of the product are not dispositive, case law addressed the issue of what circumstances were appropriate for consideration of those criteria by ITA in the event of ambiguity.

Thus, in *American NTN Bearing Mfg. Corp. v. United States*, 739 F. Supp. 1555, 1565 (CIT 1990), the court held that it was proper for ITA to use the *Diversified Products* criteria as well as other appropriate factors to clarify an ambiguity in the descriptions of the merchandise as to whether a preexisting product is covered by the order. *See also Floral Trade Council v. United States*, 716 F. Supp. 1580 (CIT 1989).

And in *Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990), the court held that the *Diversified Products* criteria "are a sound approach to determining the status of products that have been modified since the time of the investigation and final order." Indeed, in *SKF USA, Inc. v. United States Dept. of Commerce*, 762 F. Supp. 344, 349 (CIT 1991) the court held that application of the *Diversified Products* criteria is mandatory in scope determinations where the product in question is a newly developed one which was not in existence at the outset of the investigations. *See also Nitta Industries Corp. v. United States*, Slip Op. 92-51 (April 7, 1992), aff'd Appeal No. 92-1393 (Fed. Cir. June 30, 1993); *Kyowa Gas Chemical Industry Co., Ltd., supra*.

Under the 1990 regulation, 19 C.F.R. § 353.29(i)(Z), however, Commerce has made it clear that it will use *Diversified Products* criteria in those instances where, for any reason, the descriptions of the merchandise are not dispositive. The regulation is not limited to clarifications as to preexisting or modified products, and the test for resort to the *Diversified Products* criteria is broadened to simply whether or not the descriptions are "dispositive." In this case, I find that the merchandise descriptions are not dispositive, and accordingly insofar as § 353.29(i) is applicable to plaintiff's shop towels, ITA is directed to consider the criteria listed in (i)(2).

## CONCLUSION

For the foregoing reasons, ITA's Final Scope Ruling is unsupported by substantial evidence on the record and otherwise is not in accordance with law. This action is remanded for reconsideration of all the facts of record in light of the criteria listed in § 353.29(f) or in § 353.29(i)(2), as appropriate. The results of the remand shall be reported to this court within 45 days from the date of this order.

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(Slip Op. 93-146)

WIN-TEX PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND  
MILLIKEN & CO., INC., DEFENDANT-INTERVENOR

Court No. 92-04-00302 (BN)

*Appearances:*

*Adduci, Mastriani, Schaumberg & Schill (Ralph H. Sheppard, Barbara A. Murphy, and Robert J. Leo, Esqs.),* for plaintiff.

*Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice (Jeffrey M. Telep, Attorney); J.C. Lowe, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.*

*Wilmer Cutler & Pickering (John D. Greenwald, Ronald I. Meltzer, Bahram A. Zia, Esqs.) for defendant-intervenor.*

(Dated August 5, 1993)

[Plaintiff's request for judicial notice of prior unpublished scope ruling granted, but ruling denied binding precedential effect; defendant's motion to strike denied.]

OPINION AND ORDER

**NEWMAN, Senior Judge:** This case presents significant evidentiary issues, the second of first impression: Does judicial notice apply in an action before the court on the administrative record and not *de novo*? If so, in an action contesting an antidumping duty order scope determination of the United States Department of Commerce, International Trade Administration ("ITA" or "Commerce"), may the court, at plaintiff's request, take judicial notice of a prior unpublished scope determination involving plaintiff under the same antidumping duty order?

In this action, commenced pursuant to 28 U.S.C. § 1581(c), 15 U.S.C. § 1516a(a)(2)(A)(ii) and 19 U.S.C. § 1516a(a)(2)(B)(vi), plaintiff seeks to overturn Commerce's antidumping duty Final Scope Ruling of March 31, 1992: *Final Scope Ruling on the Request By Win-Tex Products, Inc. for Clarification of the Scope of the Antidumping Duty Order on Shop Towels of Cotton From the People's Republic of China* ("Final Scope Ruling"). By its Final Scope Ruling, ITA determined that plaintiff's cotton shop towels imported from Honduras are within the scope of *Shop Tow-*

*els of Cotton From the People's Republic of China; Antidumping Duty Order*, 48 Fed. Reg. 45,277 (October 4, 1983) ("Order").

Plaintiff contends that ITA erred as a matter of law in refusing to make a scope analysis under 19 C.F.R. § 353.29(f), or alternatively, under § 353.29(i)(2), and in failing to exclude plaintiff's shop towels from the Order based on their household end use and retail channels of trade. Defendant argues that the scope inquiry was properly conducted by ITA under 19 U.S.C. § 1677j(b) and 19 C.F.R. § 353.29(i)(1), and therefore, the end use and channels of trade of plaintiff's towels are irrelevant criteria for the scope determination. For the reasons stated in an opinion and order entered concurrently herewith remanding this case to ITA, Slip Op. 93-145, the court concluded that since the descriptions of the merchandise are not "dispositive" within the purview of § 353.29(i)(1), the applicable "Diversified Products" (see *Diversified Products Corp. v. United States*, 572 F. Supp. 883 (CIT 1983), modified, *Kyowa Gas Chemicals Industry Co., Ltd. v. United States*, 582 F. Supp. 887 (CIT 1984)) criteria enumerated in § 353.29(i)(2), including use and channels of trade, must be considered by ITA in the scope inquiry.

At a previous stage of this action, plaintiff sought, unsuccessfully, to supplement the administrative record of the current scope proceedings with ITA's June 13, 1984 scope ruling letter under the same Order ("1984 letter ruling"). See Slip Op. 92-142 of August 26, 1992, 797 F. Supp. 1025 (CIT 1992), denying plaintiff's motion to supplement the administrative record. Having failed in that route for judicial consideration of the 1984 letter ruling, plaintiff now requests that the court simply take judicial notice of the 1984 letter ruling "for the limited purpose of contradicting the current assertion of the Defendant that end use and retail sale [of plaintiff's shop towels] are irrelevant criteria for determining the scope of the Order."

A copy of the 1984 letter ruling is Appendix A to plaintiff's response to defendant's memorandum in opposition to plaintiff's motion for judgment on the administrative record. The 1984 letter ruling, reciting the household use and retail channels of trade for Win-Tex' "Wipe-Eze Utility Towels," excludes such towels from the Order. When the 1984 scope inquiry was initiated, ITA afforded the petitioner, Milliken & Co., an opportunity to comment on plaintiff's request for a scope ruling, and Milliken stated it had no objection to exclusion of the Wipe-Eze utility towels from the Order. After its 1984 letter ruling, ITA transmitted notice of its decision to all interested parties, and to the Customs Service, which presumably abided by ITA's ruling in the entries for which liquidations had been suspended.

Plaintiff now requests that the court take judicial notice of and to accord the 1984 ruling binding precedential effect in the present scope proceedings, insofar as in the 1984 letter ruling ITA explicitly took cognizance of the towels' household use and retail channels of trade in excluding them from the Order and ITA now maintains that use and channels of trade are irrelevant to the scope of the very same Order.

Fundamentally, of course, counsel may submit to the court the materials containing the information that they request be judicially noticed. *Wigmore on Evidence*, Vol. 9, § 2568a, pp. 720-21 (1981 ed.) ("counsel on either side are entitled to offer materials containing the information") (emphasis in original). However, defendant joined by intervenor, moves to strike the 1984 letter ruling and all references thereto in plaintiff's response, urging that under 19 U.S.C. § 1516a, and in accordance with the court's prior decision in Slip Op. 92-142, judicial review in this case is limited solely to the administrative record. For the following reasons, judicial notice is taken of the 1984 letter ruling and defendant's motion to strike is denied.

Defendant and intervenor insist that the court may not take judicial notice of, or otherwise consider, the 1984 ruling because it was not part of ITA's public file (*i.e.*, is unpublished in the Federal Register), is not part of the administrative record of this action, and was not otherwise called to ITA's attention by plaintiff during the current scope inquiry.

We first address the issue of whether judicial review on the administrative record precludes judicial notice. The concept that review on the administrative record precludes any role for judicial notice was rejected in *Borlem S.A.-Empreendimentos Industriais v. United States*, 718 F. Supp. 41 (CIT 1989), aff'd 913 F. 2d 933 (Fed. Cir. 1990).

In *Borlem*, the court expressly took judicial notice of ITA's second amended less-than-fair-value determination in reviewing the International Trade Commission's final affirmative injury determination on the administrative record and in remanding the action to the agency. Regarding judicial notice of ITA's amended less-than-fair-value determination in reviewing the Commission's, injury determination the court observed: "Although limited in its review to the administrative record, see 19 U.S.C. § 1516a(b)(1)(B), this Court must take judicial notice of decisions of federal executive departments when requested by a party. \*\*\* Since plaintiff requested this Court to take judicial notice of the Second-Amended Determination by Commerce, this court must and does take judicial notice of that determination." 718 F. Supp. at 46 (emphasis added.)

On appeal, the Federal Circuit in approving this court's judicial notice of the Amended ITA determination, observed that "what the trial court has now taken judicial notice of is not the new margin determinations themselves, but the fact that a new and different determination has been made based on the premise that the earlier one was incorrect. That action by the same government agency that generated the first determination, certainly seems to us to be a fact of which judicial notice may be taken." 913 F. 2d at 940.

Without citation of any authority on the point, defendant and intervenor insist that judicial notice of the 1984 letter ruling is precluded because it was not published in the Federal Register. However, it requires no "string" of citations to demonstrate that the courts have freely taken judicial notice of a wide range of matters, including unpublished letters.

*See Vivitar Corp. v. United States*, 593 F. Supp. 420, 430-432 (CIT 1984), *aff'd*, 761 F. 2d 1552 (1985), *cert. denied*, 474 U.S. 1055 (1986).

In *Valero v. Dahlberg*, 716 F. Supp. 1031 (S.D. Ohio 1988), plaintiff instituted an action for employment discrimination. The district court took judicial notice of an unpublished administrative decision of a referee of the State of Ohio Unemployment Compensation Board of Review called to the court's attention by an uncertified copy of the decision.

Further, defendant's objection that plaintiff's failure to exhaust its administrative remedies, *i.e.*, failure to bring up the prior scope determination before the agency, bars judicial notice is simply a recasting of its argument that judicial notice is barred in actions reviewed on the administrative record. Whether the action is before the court for decision on a record made before the agency or on the record made at a trial *de novo*, indisputable facts like the agency's own prior determinations may be judicially noticed by the court when such notice is requested by a party and is otherwise appropriate. In *Borlem*, the Federal Circuit explicitly rejected the Commission's argument that the court could not take judicial notice of ITA's amended determination since it was not on the record compiled by the Commission, observing: "Moreover, we believe it is circular reasoning to state that a fact cannot be judicially noticed unless it is so established by being on the record, that judicial notice is unnecessary." 913 F.2d at 940 (emphasis added).

In *United States v. An Undetermined Quantity, Etc.*, 583 F.2d 942, 946, n.3 (7th Cir. 1978) the district court had denied a pharmaceutical manufacturer's motion to vacate a default judgment entered in favor of the Government in an *in rem* condemnation action against the manufacturer's cough syrup sold over the counter. On appeal from the judgment of the district court, the Seventh Circuit took judicial notice of an "initial decision" of the Food and Drug Administration's administrative law judge ("ALJ") on the manufacturer's supplemental new drug application holding that the manufacturer's cough syrup was safe and effective for over-the-counter sale. Significantly, the Seventh Circuit rejected the Government's request to ignore the Food & Drug ALJ's decision on the ground that the decision *was not part of the record*.

The court next reaches plaintiff's contention that ITA's 1984 letter ruling constitutes a binding administrative precedent on the scope of the Order. Plaintiff relies on the principle of administrative law that an "agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent." *Torrington Co. v. United States*, 772 F. Supp. 1284, 1288 (CIT 1991). In further support of that argument plaintiff cites *Corex Corp. v. United States*, 454 F. Supp. 835 (C.D. Calif. 1978), an action in the district court for a refund of manufacturers excise taxes, wherein after a first trial plaintiff learned of the existence of a twenty-year old unpublished ruling of the Internal Revenue Service, dated February 19, 1958, and sought a copy of the ruling from the Service. After initial refusals, failure and "stalling" by the Service to produce a copy of its unpublished ruling, and an assertion by

the Service that the ruling could not be located and was inapplicable, the court ordered production of a copy by the United States Attorney. Upon production of a copy of the unpublished ruling by the U.S. Attorney, the court determined that the ruling was indeed applicable to the facts of the case, was binding on the Service, and that under the ruling plaintiff was not subject to the tax. *Id. at 847.*

However, *Corex* is factually distinguishable. The unpublished I.R.S. ruling in *Corex* definitively recites the circumstances under which the Service agrees that there are arm's length sales transactions between two corporations within the purview of the statute. By contrast, the 1984 letter ruling's precedential value for making a *Diversified Products* analysis under the Order, including end use and channels of trade, is seriously denigrated on its face by ITA's express declination to address any *Diversified Products* criteria and ITA's exclusion of the utility towels from the scope of the Order based simply on the agency's vague conclusory rationale that "these materials are not of the type included in the original petition, fair value investigation, or the ITC's injury investigation of Chinese cotton shop towel imports." The 1984 letter ruling, involving differently described goods than those currently before the court, contains no definitive articulation of principle with reference to the relevance of use or channels of trade criteria under the Order. Clearly, in view of the vague parameters of the 1984 ruling for a *Diversified Products* analysis, the prior ruling has no precedential value under the Order for anything other than the same merchandise and facts that were before ITA in the 1984 scope inquiry.

#### CONCLUSION

Plaintiff's request to take judicial notice of the 1984 letter ruling is granted, but I find it is not as a binding precedent in the current proceedings. For that reason, in Slip Op. 93-145, decided concurrently herewith, the 1984 letter ruling does not enter into the decision remanding the action.

Defendant's motion to strike is denied.

(Slip Op. 93-147)

BAUSCH & LOMB INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 89-11-00614

[Judgment for defendant.]

(Decided August 5, 1993)

*Thelen, Marrin, Johnson & Bridges (Paul A. Winick)* for plaintiff.

*Frank W. Hunger*, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, United States Department of Justice (*Barbara M. Epstein*), *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

#### MEMORANDUM OPINION

**DiCARLO, Chief Judge:** Plaintiff, Bausch & Lomb Incorporated, challenges Customs Service's denial of its protest, requiring plaintiff's sunglass cases imported from Mexico be marked with the country of origin. After the court denied defendant's motion for summary judgment, a trial was held. At issue is whether the sunglass cases are disposable containers, exempted from the country of origin marking requirement. The court finds plaintiff failed to establish that the subject merchandise is a disposable container as defined by Customs' regulation. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

Customs' determination that each sunglass case must be marked with the country of origin is presumed to be correct. See 28 U.S.C. § 2639(a)(1) (1988).

The marking of the country of origin is required of every imported article unless it is exempted. The statute provides, in pertinent part:

##### **(a) Marking of Articles**

Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

\* \* \* \* \*

(3) Authorize the exception of any article from the requirements of marking if—

\* \* \* \* \*

(D) The marking of a container of such article will reasonably indicate the origin of such article;

\* \* \* \* \*

19 U.S.C. § 1304 (1988).

The exemption at issue is provided by Customs' regulation as follows:

When *disposable containers* or holders are imported by persons or firms who fill or package them with various products which they sell, these persons or firms are the "ultimate purchasers" of these containers or holders and they may be excepted from individual marking pursuant to 19 U.S.C. 1304(a)(3)(D). The outside wrappings or packages containing the containers shall be clearly marked to indicate the country of origin.

19 C.F.R. § 134.24(c)(1) (1992) (emphasis added). The regulation defines "disposable containers":

Disposable containers or holders subject to the provision of this section are the usual ordinary types of containers or holders, including cans, bottles, paper or polyethylene bags, paperboard boxes, and similar containers or holders which are ordinarily discarded after the contents have been consumed.

*Id.* 134.24(a).

Plaintiff claims that the individual sunglass cases need not be marked since the marking of the outer box containing the sunglass cases is sufficient pursuant to § 134.24(c)(1). A trial was held to determine whether plaintiff's sunglass cases are disposable container within the meaning of the regulation.

The products at issue are two sizes of sunglass cases manufactured in Mexico. Stipulation Nos. 3 & 8. After importation, plaintiff inserts its wire-framed sunglasses in the cases for sale to its customers. *Id.* Nos. 8, 28 & 70. The cases are made of outer layer of pebble grain expanded vinyl with a hard plastic insert and a metal snap closure which secures the sunglasses in the case. *Id.* No. 10. The case may be worn on a belt using the slit in the back of the case. *Id.* No. 33. The sunglass cases are not similar to cans, bottles, paper or polyethylene bags, or paperboard boxes, which the regulation lists and are disposable containers.

Plaintiff sells the sunglass cases at issue separately from sunglasses to its customers. *Id.* No. 49. One of plaintiff's authorized sellers has offered the cases for sale to the public for \$9.90. *Id.* No. 34.

Plaintiff's divisional director of engineering was the sole witness at the trial. He testified that one of the purposes of developing the sunglass cases was to substantially protect the product and address the shipping damage plaintiff was experiencing. Tr. 38. The specifications of the sunglass cases require that the cases must be capable of being opened and closed 3000 times without failure. Stipulation No. 18. Plaintiff's sunglass cases have been advertised as "crush-proof," "durable," or "heavy duty." *Id.* Nos. 31 & 32.

The witness acknowledged that it may be advantageous for a consumer to use the hard sunglass case at issue even for glasses which are sold with a soft case. He testified that an appropriately fit hard case would provide more crush-resistance than a soft case. Tr. 65-66. The evidence at the trial established that the sunglass cases at issue can physically accommodate other sunglasses or prescription glasses. Tr. 61

& 80-81. The witness testified that improper fit might result in the abrasion on the surface of the glasses, causing cosmetic damage. Tr. 61.

As conceded by plaintiff's counsel, plaintiff has not established that the sunglass cases have no utility for a consumer who retains it. Tr. 114-15. It was further conceded that plaintiff has not established that the consumer does not reuse its case with sunglasses and/or prescription glasses that are of similar size and shape to the particular sunglasses with which the case is sold. Tr. 112.

At the end of the trial, the court found that plaintiff has not established that the sunglass cases are ordinarily discarded by the consumer after any particular amount of usage, or after any particular event. Tr. 109-10. Based on the trial testimony, stipulations, and the examination of the sunglass cases, the court finds plaintiff failed to establish that the cases are ordinarily discarded after the contents have been consumed. Therefore, the cases are not exempted from the marking requirement under 19 C.F.R. § 134.24(c)(1).

Plaintiff raises a legal argument that the requirement of the container being in use at the time of importation results in discrimination against United States eyeglass manufacturers. According to plaintiff, such requirement confers unfair competitive advantage to foreign manufacturers because they may import foreign made eyeglass cases without the country of origin marking under the exception of 19 U.S.C. § 1304(b) (1988). The statute provides “[u]sual containers *in use as such at the time of importation* shall in no case be required to be marked to show the country of their own origin.” *Id.* (emphasis added). For example, a foreign manufacturer may ship its eyeglasses to Mexico, insert them in Mexican cases and import into the United States without informing the end-consumers that the cases are made in Mexico. While this may be true, the statutory language is clear that the country of origin marking of container is exempted only when it is “in use as such at the time of importation.” Since plaintiff's empty and not being used at the time of importation, plaintiff is not entitled to the exemption under § 1304(b).

Accordingly, the sunglass cases at issue are required to be marked to indicate Mexico as the country of origin.

(Slip Op. 93-148)

UNITED STATES, PLAINTIFF *v.*  
NEMAN BROTHERS & ASSOCIATES, AND YOEL NEMAN, DEFENDANTS

Court No. 89-07-00444

[Defendants' motion for an extension of time is granted.]

(Dated August 6, 1993)

*Frank W. Hunger*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Anthony H. Anikeeff*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; of counsel: *Joanne Halley*, Assistant Regional Counsel, United States Customs Service, Long Beach, California for plaintiff.

*Leonard M. Fertman*, P.C. (*Leonard M. Fertman*) for defendants.

MEMORANDUM OPINION AND ORDER

*MUSGRAVE, Judge*: On June 30, 1993, the United States, pursuant to USCIT Rule 37, filed a motion requesting that the Court impose the sanctions of striking the answers of and entering default judgment against defendants Neman Brothers & Associates ("Neman Brothers") and Yoel Neman, for their respective failures and refusals to respond to discovery properly propounded to them by the United States. The United States further requested that the Court impose the sanction of a default judgment against Neman Brothers for its continued refusal to retain new counsel following the withdrawal of its original counsel, in violation of Rule 75(b) of the Rules of the United States Court of International Trade. The United States further requested that the Court award it the expenses that it has incurred in seeking defendant's compliance with its discovery requests. *See Motion for Sanctions*, June 30, 1993. Defendants, Neman Brothers filed a request for an extension of time to reply to the United States' Motion for Sanctions on July 29, 1993.

Normally, a motion for sanctions is not deemed dispositive and therefore the response time is ten working days and five mailing days. *See USCIT Rule 7(d)*. Under this analysis, defendants' motion is late indeed. Defendants may have viewed the Motion for Sanctions as dispositive because the motion requests that the Court enter default judgment. In that case, defendants would have had thirty days to respond.

Under Rule 55, governing default, the Court is entitled to view a motion for default judgment as non-dispositive because no *entry* of default has been executed prior to the plaintiff's present motion for default judgment. Entry of default must precede a motion for default judgment. *See USCIT Rule 55*. However, Rule 37(b)(3) appears to grant the Court the discretion to issue default judgment directly upon failure of a party to comply with an order. Defendants have failed to comply with at least one of the Court's previous orders.<sup>1</sup>

<sup>1</sup> By order dated March 23, 1991, the Court ordered Neman Brothers and Yoel Neman to respond to the United States' outstanding discovery within sixty days of said order.

Even if the Court were to accept the interpretation hypothesized for the defendants, their motion for an extension of time may still be deemed untimely because it was not "filed prior to the expiration of the period allowed for the performance of the act to which the motion relates." *See USCIT Rule 6(b)(2)*. The filing of a motion for extension of time on the last day of the period for performance has been thoroughly discouraged by this Court:

[T]he dictate [of Rule 6] is that motions for extensions of time, which require prompt attention, be made far enough in advance of deadlines so as to afford the court at least some time within the litigants' periods to perform to decide them. Otherwise, parties like the defendants herein could automatically extend the time mandates of Congress and this Court of International Trade,

*Internor Trade Inc. v. United States*, 10 CIT 472, 473 (1986) ("Internor Trade"). Although *Internor Trade* was governed by 28 U.S.C. § 2635(b)(1) and USCIT 71(a), the principle of discouraging the parties from manipulating the Court time schedules and the Court's good will is equally compelling here.

Rule 6 does provide an exception for tardiness when good cause is shown that the delay in filing was the "result of excusable neglect or circumstances beyond the control of the party." *USCIT Rule 6(b)(2)* (emphasis supplied). Defendants' attorney has filed an affidavit to this effect that in normal circumstances would be acceptable. Although the circumstances of this delay may well have been beyond the control of defendants' attorney, they most certainly were not beyond the control of the *party* itself. Defendants have used appointment and termination and reappointment of counsel throughout this litigation to manipulate these proceedings.

In spite of the very worrisome allegations in plaintiff's Motion for Sanctions, and defendants' apparent pattern of delay, the Court is prepared to grant defendants' request to extend the time to respond to plaintiff's motion to and including August 28, 1993; no further extensions will be granted under any circumstances. Plaintiff no doubt seeks substantial fines and penalties and the Court does not lightly deny defendant its day in court. Nonetheless, the Court takes the allegations in plaintiff's motion and supporting documents very seriously and reserves the decision to impose full sanctions if those allegations can be substantiated beyond rebuttal. Defendants are warned that any further requests for extensions may be viewed as further evidence that defendants intend not to cooperate in the hopes that this case will just go away. *See Letter of Leonard M. Fertman, March 18, 1991* (addressed to his clients, the Neman Brothers and Yoel Neman). It is hereby

ORDERED that defendants' motion for an extension of time to respond to plaintiff's motion for sanctions is hereby granted; and it is further

ORDERED that defendants' response must arrive at the office of the Clerk of the Court by August 28, 1993.

(Slip Op. 93-49)

UNITED STATES, PLAINTIFF v. YOEL NEMAN, DEFENDANT

Court No. 89-03-00146

[Defendants' motion for an extension of time is granted.]

(Dated August 6, 1993)

*Frank W. Hunger*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Anthony H. Anikeeff*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; of counsel: *Joanne Halley*, Assistant Regional Counsel, United States Customs Service, Long Beach, California for plaintiff.

*Leonard M. Fertman, P.C.* (*Leonard M. Fertman*) for defendant.

#### MEMORANDUM OPINION AND ORDER

**MUSGRAVE, Judge:** On June 30, 1993, the United States, pursuant to USCIT Rule 37, filed a motion requesting that the Court impose the sanctions of striking the answers of and entering default judgment against defendants Neman Brothers & Associates ("Neman Brothers") and Yoel Neman, for their respective failures and refusals to respond to discovery properly propounded to them by the United States. The United States further requested that the Court impose the sanction of a default judgment against Neman Brothers for its continued refusal to retain new counsel following the withdrawal of its original counsel, in violation of Rule 75(b) of the Rules of the United States Court of International Trade. The United States further requested that the Court award it the expenses that it has incurred in seeking defendants' compliance with its discovery requests. *See Motion for Sanctions*, June 30, 1993. Defendant Yoel Neman filed a request for an extension of time to reply to the United States' Motion for Sanctions on July 29, 1993.

Normally, a motion for sanctions is not deemed dispositive and therefore the response time is ten working days and five mailing days. *See USCIT Rule 7(d)*. Under this analysis, defendant's motion is late indeed. Defendant may have viewed the Motion for Sanctions as dispositive because the motion requests that the Court enter default judgment. In that case, defendant would have had thirty days to respond.

Under Rule 55, governing default, the Court is entitled to view a motion for default judgment as non-dispositive because no *entry* of default has been executed prior to the plaintiffs present motion for default judgment. Entry of default must precede a motion for default judgment. *See USCIT Rule 55*. However, Rule 37(b)(3) appears to grant the Court the discretion to issue default judgment directly upon failure of a party to comply with an order. Defendant has failed to comply with at least one of the Court's previous orders.<sup>1</sup>

<sup>1</sup> By order dated March 23, 1991, the Court ordered Neman Brothers and Yoel Neman to respond to the United States' outstanding discovery within sixty days of said order.

Even if the Court were to accept the interpretation hypothesized for the defendant, its motion for an extension of time may still be deemed untimely because it was not "filed prior to the expiration of the period allowed for the performance of the act to which the motion relates." *See USCIT Rule 6(b)(2)*. The filing of a motion for extension of time on the last day of the period for performance has been thoroughly discouraged by this Court:

[T]he dictate [of Rule 6] is that motions for extensions of time, which require prompt attention, be made far enough in advance of deadlines so as to afford the court at least some time within the litigants' periods to perform to decide them. Otherwise, parties like the defendants herein could automatically extend the time mandates of Congress and this Court of International Trade.

*Internor Trade Inc. v. United States*, 10 CIT 472, 473 (1986) ("Internor Trade"). Although *Internor Trade* was governed by 28 U.S.C. § 2635(b)(1) and USCIT 71(a), the principle of discouraging the parties from manipulating the Court time schedules and the Court's good will is equally compelling here.

Rule 6 does provide an exception for tardiness when good cause is shown that the delay in filing was the "result of excusable neglect or circumstances beyond the control of the party." *USCIT Rule 6(b)(2)* (emphasis supplied). Defendant's attorney has filed an affidavit to this effect that in normal circumstances would be acceptable. Although the circumstances of this delay may well have been beyond the control of defendant's attorney, they most certainly were not beyond the control of the *party* itself. Defendant has used appointment and termination and reappointment of counsel throughout this litigation to manipulate these proceedings.

In spite of the very worrisome allegations in plaintiff's Motion for Sanctions, and defendant's apparent pattern of delay, the Court is prepared to grant defendant's request to extend the time to respond to plaintiff's motion to and including August 28, 1993; no further extensions will be granted under any circumstances. Plaintiff no doubt seeks substantial fines and penalties, and the Court does not lightly deny defendant its day in court. Nonetheless, the Court takes the allegations in plaintiff's motion and supporting documents very seriously and reserves the decision to impose full sanctions if those allegations can be substantiated beyond rebuttal. Defendant is warned that any further requests for extensions may be viewed as further evidence that defendant intends not to cooperate in the hopes that this case will just go away. *See Letter of Leonard M. Fertman, March 18, 1991* (addressed to his clients, the Neman Brothers and Yoel Neman). It is hereby

ORDERED that defendant's motion for an extension of time to respond to plaintiff's motion for sanctions is hereby granted; and it is further

ORDERED that defendant's response must arrive at the office of the Clerk of the Court by August 28, 1993.

(Slip Op. 93-150)

BANDO CHEMICAL INDUSTRIES, LTD. AND BANDO AMERICAN INC.,  
PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 89-07-00399

PIRELLI TRANSMISSION INDUSTRIALI, S.P.A. AND PIRELLI  
INDUSTRIAL PRODUCTS CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 89-07-00430

[Plaintiffs' motions for judgment on the agency records and for summary judgment denied in part and granted in part.]

(Decided August 6, 1993)

Gibson, Dunn & Crutcher (Joseph H. Price, Donald Harrison, Naoyuki Agawa and Sharon T. Maier) for plaintiffs Bando Chemical Industries, Ltd. and Bando American Inc. Barnes, Richardson & Colburn (Matthew T. McGrath and Peter L. Sultan) for plaintiffs Pirelli Trasmissioni Industriali, S.p.A. and Pirelli Industrial Products Corporation.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Marc E. Montalbene) for the defendant.

Office of the General Counsel, U.S. International Trade Commission (Lyn M. Schlitt, James A. Toupin and George Thompson) also for the defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Jessica Wasserman and Patrick J. McDonough); and James E. Neison, Esq., The Gates Rubber Company, of counsel, for the intervenor-defendant.

#### MEMORANDUM

AQUILINO, Judge: In slip op. 92-26, 16 CIT \_\_\_, 787 F. Supp. 224 (1992), familiarity with which is presumed, this court granted in part motions of the above-named plaintiffs focused on the affirmative determination of the International Trade Commission ("ITC") *sub nom. Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany*, 54 Fed. Reg. 24,430 (June 7, 1989). In particular, the motions challenge the determination insofar as it is based on the views of Commissioner David B. Rohr, who concluded that material injury did not exist but that the domestic industries producing V-type and synchronous-type power-transmission belts are threatened with such injury by reason of imports from Italy and Japan found by the International Trade Administration, U.S. Department of Commerce ("ITA") to be sold in the United States at less than fair value and also that the domestic industry producing all other types of power-transmission belts is threatened with material injury by reason of imports from Japan found by the ITA to be sold at less than fair value.<sup>1</sup>

<sup>1</sup> See *Industrial Belts from Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany*, USITC Pub. 2194, pp. 25-26 (May 1989) (Views of Commissioner David B. Rohr). These views on threat, derived, as indicated, by analytical subdivision of the overall domestic industry and coupled with determinations of actual injury by Commissioners Eckes and Newquist, constituted an affirmative final determination of material injury by the ITC under 19 U.S.C. § 1677(11), Chairman Brundale, Vice Chairman Cas and Commissioner Lodwick dissenting. See 54 Fed. Reg. at 24,430-31. See generally *MBL (USA) Corporation v. United States*, 16 CIT \_\_\_, 787 F. Supp. 202 (1992).

## I

In slip op. 92-26, the court concluded that the respective motions had to be granted, "at least to the extent that the underlying proceedings be remanded to the ITC to enable Commissioner Rohr to reflect on, and explain further, his views". 16 CIT at \_\_\_, 787 F.Supp. at 227. The remand was based, in part, upon reasoning that the commissioner is presumed to have considered all of the relevant factors regarding determination of threat of material injury, including those listed in 19 U.S.C. § 1677(7)-(F)(i), but that that

presumption alone \*\*\* is not enough to sustain his determination – it must have a reviewable, reasoned basis. *See, e.g., A. Hirsh, Inc. v. United States*, 14 CIT 23, 25, 729 F.Supp. 1360, 1362 (1990), *aff'd*, 948 F.2d 1240 (Fed.Cir. 1991), and cases cited therein. As explained in *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 1174, 1177, 704 F.Supp. 1068, 1071 (1988), that an

administrative agency may make varying decisions based on the facts of particular cases does not permit the agency to act arbitrarily. In order to ascertain whether action is arbitrary, or otherwise not in accordance with law, reasons for the choices made among various potentially acceptable alternatives usually need to be explained.

In the cases at bar, the court is unable to determine, for example, either why the commissioner chose to discount the points raised by Bando or the data upon which he relied in reaching his determination as to Italy. In short, he seems to have failed to articulate a "rational connection between the facts found and the choice made." *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

16 CIT at \_\_\_, 787 F.Supp. at 227. Such articulation is particularly important here because "the projection of future events is necessarily more difficult than the evaluation of current data". *Yuasa-General Battery Corp. v. United States*, 12 CIT 624, 628, 688 F.Supp. 1551, 1555 (1988), quoting H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

## A

In compliance with the court's order, Commissioner Rohr has now filed extensive views<sup>2</sup>, based to a significant degree on confidential business proprietary information contained in the ITC's administrative record. At the outset, the commissioner explains the brevity of his original, reported reasoning as follows:

This remand points up a \*\*\* broad issue with respect to Commission decisions. The Court, in finding my determination to be without substantial evidence, made a point of the brevity I used in summarizing the evidence that I felt supported each of the twenty-

<sup>2</sup> They will be cited hereinafter as "Views on Remand".

four determinations I found necessary for each of the separate countries and separate products in the original investigations. The court recognized that my Brevity was conditioned by the problem of confidentiality. The court contrasted my decision to treat information in general terms with some of my colleagues' decisions to prepare confidential opinions.

My desire to write a nonconfidential opinion required me to state, in the simplest and most general of terms, the essentials of the foreign capacity, import market shares, and pricing information that I felt were sufficient to form the basis for affirmative and negative threat findings. I did not address many of the specific arguments raised by these plaintiffs in their appeals, or by other parties in the proceedings before the Commission, not because I did not consider them, but rather because, having considered them, I did not feel them to be persuasive, or to detract from the affirmative evidence, or because to answer them would involve disclosure of confidential data.

I continue to believe that as a matter of policy the Commission should not prepare confidential opinions. However, for purposes of this remand, I have concluded that there is no possibility that I can satisfy the Court's requirement for me to address the arguments, made by plaintiffs in their appeals, in these remand determinations without an extensive review and explanation of confidential information. I have therefore reluctantly decided to prepare a confidential version of this opinion.

Views on Remand, pp. 2-3 (footnote 6 omitted). Footnote 7 to this explanation adds:

A title VII investigation by the Commission is not like a private dispute between two private parties. It is important that the public be aware to the greatest extent possible the reasons for our decisions. The choice then comes down to whether a statement such as "Production \* \* \* from \* \* \* in 1986 to \* \* \* in 1987 \* \* \* in 1988 for a \* \* \* percent \* \* \* over the period of investigation" is more or less illuminating to the public than the statement "The production indicators provide only a little support for an affirmative determination." I believe the latter, because it indicates how the "facts" fit into a conclusion, is better. That is why I choose that format. I recognize that not all of my colleagues share this view.

Be this difference in approach on the part of members of the ITC as it may<sup>3</sup>, Commissioner Rohr concludes anew on remand that

all three domestic industries are threatened with material injury by reason of imports from Japan. I determine that the V-Belt and Synchronous Belt industries are threatened with material injury by reason of Italian imports. I find the All Other Belt industry is not materially injured nor is it threatened with material injury by reason of Italian imports.

<sup>3</sup> Of course, the court, which is also privy to the business proprietary information on the record, is confronted with the same concerns as to confidentiality. In these cases, the court has necessarily reviewed that information but has decided, in view of the nature of the issue at bar, to render this memorandum without disclosure of those data and hence a non-public version.

\*\*\* I find the threats to be real and imminent. My findings \*\*\* that none of the three industries are currently experiencing material injury does not mean \*\*\* that I am finding these industries to be "healthy." It also does not mean that the industries are not being affected, even adversely affected, by imports. Each of the industries was experiencing declines in certain key indicators. My finding was merely a conclusion that the declines had not reached a level \*\*\* properly characterized as "material injury."

\*\*\* I am concluding that all three industries are relatively close to a level of material injury, the closest being the V-Belt industry and the farthest being the All Other Belts industry. My conclusions \*\*\* are that the impact of V-Belts imports from the two countries under consideration at this time are likely to be small but continuously adverse and sufficient to push the industry over the line into material injury within a very short, i.e. imminent time frame. I conclude that the impact of Synchronous Belt imports are likely to be somewhat greater and sufficient to push the somewhat stronger Synchronous Belt industry into a condition of material injury. Finally, while I find the All Other Belts industry to be the least close to the material injury characterization by the end of the period of investigation, the impact of imports is likely to be strongest and so I conclude that the threat posed by the LTFV imports to that industry is also real and imminent.

With respect to the issue of material injury "but for" the suspension of liquidation, I reaffirm my original determination that there is insufficient evidence for me to conclude that there would have been material injury to any of these industries by reason of imports but for the suspension of liquidation as to entries of those imports after the Commerce preliminary determination.<sup>4</sup>

The commissioner comes to these conclusions after discussing first the "vulnerability" of the industries, then the above-referenced factors of 19 U.S.C. § 1677(7)(F)(i) and finally specific issues raised by the plaintiffs in regard to the remand. Stating that his original views did not encompass a finding regarding the vulnerability of the industries<sup>5</sup>, Commissioner Rohr now believes "that a more explicit examination of the vulnerability of the industries is useful."<sup>6</sup> With regard to V-belts, the commissioner reasons that the "very nature of the mixed indicators and the very close question of whether the data actually describe [ ] an industry experiencing material injury clearly point to the considerable vulnerability of this industry."<sup>7</sup> As for synchronous belts, he views that industry as "somewhat stronger than the V-Belt industry, yet it, too, is in a state in which the effects of imports would not have to be very great to push it into a condition of material injury."<sup>8</sup> Lastly, Commissioner

<sup>4</sup> Views on Remand at 26-27.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 6-7.

<sup>8</sup> *Id.* at 8.

Rohr concludes that the industry for all-other belts "seems to be the least vulnerable but also is displaying at least some vulnerability to the effects of imports."<sup>9</sup>

In addition to discussing at length, as indicated, the statutory factors in regard to threat of material injury emanating from the plaintiff exporters in Japan and Italy, the commissioner also responds to specific issues raised as to Japan, to wit, the opening of production facilities in the United States, the reported capacity utilization rate of plants in Japan, the volume of Japanese imports, the stated intentions of producers in Japan vis-à-vis the U.S. market, the reported data on inventory of the Japanese merchandise, and the available data on pricing of the exports from Japan. None of these points caused Commissioner Rohr to waiver in his views as to the existence of threat.

## B

The commissioner's supplemented reasoning has not caused the plaintiffs to waiver either in their respective views that he has missed the mark required to affirmatively find threat of imminent material injury. The plaintiffs Bando conclude that Commissioner Rohr's views amount to the "kind of 'conjecture' and 'supposition' that the ITC has been admonished by Congress to avoid.<sup>10</sup> The Pirelli plaintiffs complain, among other things, that the commissioner

has chosen to make new affirmative threat determinations. He has de-emphasized some of the factors on which he previously relied for his affirmative determinations, and has introduced new factors which were previously not discussed. Commissioner Rohr's analysis of the statutory threat factors on remand continues to be flawed by substantial errors as to the evidence on the record.

Plaintiffs' Post-Remand Brief, p. 2.

## II

In pressing their claims, the plaintiffs recognize, as they must, that the "Commission has discretion in interpreting the information before it." *Id.* at 3. This is particularly appropriate when threat, which Congress has seen fit to require the ITC to consider, is the issue. And the statutory standard for judicial review of an ITC determination is whether it is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B). Such review does not extend beyond determining whether the Commission has acted within its delegated authority and has correctly interpreted and applied the law. The court may not weigh evidence concerning specific factual findings nor may it substitute its judgment for that of the ITC. In short, the plaintiffs have a difficult burden of showing that the challenged determination is unsupported by substantial evidence or not in accordance with law.

<sup>9</sup> *Id.* at 9-10.

<sup>10</sup> Comments of Plaintiffs on Remand Views of Commissioner Rohr [hereinafter "Bando Brief"], p. 37.

Notwithstanding these standards for judicial review, the plaintiffs argue over the record evidence at length.<sup>11</sup>

#### A

Each complains that Commissioner Rohr improperly considered the vulnerability of the domestic industry, arguing that this is not contemplated by the statute and that the "undefined and subjective nature of the concept of vulnerability makes it of little help to a reviewing court." Bando Brief at 8.

The commissioner explains that it is his habit to first assess the vulnerability of the domestic industry in question before evaluating data regarding likely imports. *See Views on Remand* at 4-5. The defendant admits that vulnerability is not specified in the governing statute but cites *The Calabrian Corp. v. U.S. Int'l Trade Comm'n*, 16 CIT \_\_\_, Slip Op. 92-69 (May 13, 1992), to the effect that consideration of this phenomenon has been upheld. *See also Metallverken Nederland, B.V. v. United States*, 13 CIT 1013, 1029, 728 F. Supp. 730, 742 (1989); *Anhydrous Sodium Metasilicate From France*, 46 Fed. Reg. 176, 179 (Jan. 2, 1981) (additional views of Commissioner Stern discussing the vulnerability of the domestic industry).

In concluding that the domestic industry is vulnerable, Commissioner Rohr is merely taking a first step in considering whether or not threat exists. The plaintiffs do not show that, in assessing domestic susceptibility, the commissioner has failed to follow the statutory requirements or has overstepped the ITC's parameters. He "need not use the precise statutory language in his findings as long as the basis of his determination is reasonably discernable." *Metallverken Nederland B.V. v. United States*, 13 CIT at 1036, 728 F. Supp. at 747, citing *Negev Phosphates, Ltd. v. U.S. Dep't of Commerce*, 12 CIT 1074, 1083, 699 F. Supp. 938, 947 (1988), *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1218, 704 F. Supp. 1075, 1094 (1988), *American Spring Wire Corp. v. United States*, 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985), and *British Steel Corp. v. United States*, 8 CIT 86, 98, 593 F. Supp. 405, 414 (1984).

The plaintiffs argue that Commissioner Rohr's conclusions that the domestic V-belt industry is considerably vulnerable<sup>12</sup> and "certainly heading for material injury"<sup>13</sup> are at odds with earlier statements by him regarding the state of that industry. Pirelli Plaintiffs' Post-Remand Brief at 5-6. Similarly, the conclusion that the synchronous-belt industry, while healthier than that for the V-belts, is nevertheless "in a state in which the effects of imports would not have to be very great to push it

<sup>11</sup>The quality of their written presentations, as well as of those in opposition, has obviated any need for oral argument.

<sup>12</sup>Views on Remand at 7.

<sup>13</sup>*Id.*

into a condition of material injury"<sup>14</sup> is allegedly based on erroneous analysis of the industry's financial condition and market share. *See id.* at 6-8.

The assessment of the state of the domestic industry vis-à-vis foreign threat does not require, however, that it be "near the brink of material injury", to borrow the Pirelli plaintiffs' words. To conclude, as Commissioners Eckes and Newquist have herein, that that industry is now experiencing material injury by reason of investigated imports is necessarily based on perception of the present. With regard to threat, on the other hand, the ITC considers the current situation with an eye towards the future. This is not the same perspective and may not lead to conclusions reached about material injury to the domestic industry now.

In any event, this court cannot conclude that Commissioner Rohr's initial focus was proscribed by law or that the record is devoid of substantial evidence indicating that the domestic subindustries of that focus are susceptible to material injury by reason of foreign imports.

## B

According to statute, the relevant economic factors which the ITC shall consider in determining whether an industry in the United States is threatened with material injury by reason of imports include, but are not limited to:

- (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
- (III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
- (IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,
- (V) any substantial increase in inventories of the merchandise in the United States,
- (VI) the presence of underutilized capacity for producing the merchandise in the exporting country,
- (VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,
- (VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671 or 1673 of this title or to final orders under section 1671e or 1673e of this title, are also used to produce the merchandise under investigation[.]

19 U.S.C. § 1677(7)(F)(i). Furthermore,

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<sup>14</sup>*Id.* at 8.

[a]ny determination by the Commission under this subtitle that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is real and that actual injury is imminent. Such a determination may not be made on the basis of mere conjecture or supposition.

19 U.S.C. § 1677(7)(F)(ii).

In reaffirming his determination that the domestic V-belt and synchronous-belt industries are threatened with material injury by reason of imports from Japan and Italy, Commissioner Rohr examines the foregoing factors on the record.

(1)

The commissioner considers increased production capacity or unused capacity in those two countries to be significant factors in support of his determination. Bando and Pirelli challenge his analysis, each on different grounds.

(a)

In regard to Japan, Commissioner Rohr concludes that capacity is not a realistic limit to production. *See* Views on Remand at 20. He examines production and capacity to calculate capacity utilization ratios. Bando points out that the production used in his analysis encompasses automotive belts, which are not subject to the administrative proceedings at bar, and that the production of industrial belts is actually significantly lower than that relied upon on remand. They add that the change in the number of industrial belts produced from 1986 to 1988 was markedly different from that of automotive belts during the same period. Furthermore, the plaintiffs contend that shipments in the home market mirrored change in production. Therefore, the number of belts available for export was unchanged, and increased production is not a factor supporting a threat determination. Similarly, the commissioner's analysis of Japanese capacity includes production of automotive belts. The plaintiffs contend that the actual percentage of capacity increase for industrial belts is lower than the aggregate figure relied upon. In addition, they claim that home-market demand for that product far exceeded the increase in capacity, providing further support for the proposition that exports are not likely to increase.

It is true that Commissioner Rohr relied in part upon aggregate data in reaching his conclusion that capacity was not a limit on production, pointing to the trend in increased production and capacity utilization as likely to result in a significant increase in exports to the United States. However, the commissioner also considered production figures of industrial belts alone, and those figures tend to support his conclusion, albeit to a lesser extent. *Cf. id.* at 20, n. 63. Furthermore, the defendant argues that automotive-belt production was examined as an indicator of what the industry is capable in the production of power-transmission belts, challenging plaintiffs' position regarding the level of operations as com-

pared with normal capacity. The question then becomes whether shifts in production are likely to result in increased exports and, if so, if such exports would be directed to the U.S. market.

Bando argues that increased demand in the home market affected capacity-utilization rates, which were, in turn, incorrectly relied upon by Commissioner Rohr as support for the perception that Japanese producers are able and likely to increase exports to the United States. The plaintiffs point out that, in order to meet demand for belts in the home market, the plants there required overtime by their workers. The ability to shift production is only temporary and not an indication that Bando is able to sustain capacity at those levels.<sup>15</sup> Furthermore:

Bando has faced a demand for more belts than it can produce in its customary mode of two shifts of employees working seven hours per day, five days per week. Adding a third shift is not a viable alternative \*\*\* because it would require hiring additional workers; as a matter of Bando policy, such additional workers could not be discharged if demand slowed, but instead would be retained until retirement. Bando has therefore responded to the need for additional output by asking its employees to work on the average of two to two and one half extra hours per day during the normal work week and to work full seven hour days on | many Saturdays which would otherwise be holidays. Bando has therefore been able to operate substantially in excess of its normal capacity.

Bando Brief at 11-12, quoting Bando's ITC Post-Hearing Brief at Attachment D. That is, the data and explanation of Japanese hiring practices "depict an industrial belts industry operating at its limits, straining just to keep up with \*\*\* domestic demand." *Id.* at 12. "Companies, such as the Japanese producers in this case, which are operating \*\*\* through the use of overtime and other means just to keep up with \*\*\* home market demand, will not pose an imminent export threat to U.S. industries." *Id.* at 14. The plaintiffs urge this court to reject Commissioner Rohr's approach as arbitrary and in disregard of the evidence at hand, which does not support the notion that the increased production was likely to lead to increased exports.

The defendant points out that the issue is not whether the explanation for capacity utilization is reasonable, rather whether it supports the view that it is a limitation on the ability to produce.

Here, Commissioner Rohr focuses on the ability of Japanese producers to exceed stated capacity and determines that that capacity has not curtailed production. There is support for this conclusion, notwithstanding plaintiffs' foregoing explanation of the reasons for operating at excess levels. Moreover, 19 U.S.C. § 1677(7)(F)(i)(II) provides for the consideration of current increased production or existing unused capacity in determining the likelihood of increased exports of the merchandise to the United States. Thus, although the plaintiffs correctly point

<sup>15</sup>The court notes in passing, however, that the record shows those levels to have been sustained for a number of years.

out that either under- or over-utilization of current capacity may be used as evidence of potential for such exports, either approach is still in accordance with law.

The plaintiffs view the figures relating to percentage of exports relied upon by Commissioner Rohr as being of "little significance". Bando Brief at 15. They point to the changing percentage of shipments in the home market as tending to disprove the likelihood of increasing exports to the United States. Bando rejects the commissioner's conclusion regarding the change in percentages of total Japanese production being exported to the United States. The plaintiffs claim that, using the same data presumably relied upon by Commissioner Rohr, which includes automotive belts, the actual percentages from 1986 to 1988 are contrary to the percentages now cited by him. They state that the same results obtain using data for power-transmission-belt production and export only. They claim the change in the percentage being exported during the last year of the period of investigation is significant evidence that any threat of material injury is not imminent as required by 19 U.S.C. § 1677(7)(F)(ii).

Nevertheless, the percentages both by unit and value do not mirror the change with regard to total production for that year and, in fact, support the commissioner's conclusion regarding the significance for the U.S. market. Also, even accepting the percentages pressed by the plaintiffs, the overall trend for the period of investigation supports Commissioner Rohr's conclusion that the results of any increased production are likely to be for the U.S. market.

(b)

With regard to Italy on the other hand, the commissioner considers unused capacity to be important in determining that producers in that country are able to increase their level of production. His examination of Italian export data indicates a likelihood that additional product would be exported to the U.S. market. *See Views on Remand at 11-12.*

The Pirelli plaintiffs question such a view insofar as based on production by unit rather than by weight. While their plea for consideration of weight rather than unit data is not without merit<sup>16</sup>, there is no showing that Commissioner Rohr's decision to rely on unit production is not supportable. While acknowledging plaintiffs' preference, the commissioner then explains his choice that "it is units of belts not the weight of the belts which impacts the U.S. market and U.S. industry." *Id.* at 17 and n. 56. According to defendant's counsel, this weight-versus-unit issue was thoroughly aired at the administrative level.

<sup>16</sup>In support of their argument, the plaintiffs point out that,

[a]ccording to Commissioner Rohr's reasoning, the sale of 10 sewing machine belts for \$1 each (a total of \$10) would be more significant—in fact, ten times as significant—than the sale of one mining machinery belt for \$500. Clearly, this does not make sense from a commercial standpoint. For a product like industrial belts, which comes in so many different sizes and unit values, weight is a better production capacity indicator than units.

Pirelli Plaintiffs' Post-Remand Brief, p. 9.

The plaintiffs point out that, even on a unit basis, the Italian production capacity figures did not change significantly during the period of investigation. They point to capacity utilization figures as evidence that the industry is "operating at nearly full, or perhaps even full, capacity". Pirelli Plaintiffs' Post-Remand Brief at 10. Therefore, they argue, there was little or no ability to increase exports to the United States. The plaintiffs state that Commissioner Rohr focuses on theoretical capacity rather than accepting that current capacity data do not support his finding of threat of material injury. They claim that it is "unreasonable to assume that Pirelli could and would produce to its full theoretical capacity" and that it is "well known that at about 80 to 85 percent of capacity utilization, firms begin to reach capacity constraints notwithstanding the theoretical excess capacity available". *Id.* at 11. However, the Pirelli plaintiffs do not provide support for these contentions nor do they show that Commissioner Rohr has acted arbitrarily in determining that, given the current capacity-utilization figures in the record, Italian producers are both able and likely to increase the level of exports to the United States. They do suggest that the commissioner may be thinking of the particular circumstances in Japan, which provide both the opportunity and the incentive to operate above full capacity, and claim that such conditions do not exist in Italy. However, it is clear in Commissioner Rohr's expanded views that his conclusion regarding Italy is not based on ability to produce above full capacity, rather it is based on existing unused capacity. He notes that, even given the trend in capacity utilization in Italy during the period of investigation, there remains capacity to produce belts which is significant compared to the number currently exported to the United States. *See Views on Remand at 11.*

Commissioner Rohr finds a sufficient likelihood that additional product would be sent to the United States. He relies on the trend in Italian exports to this country during the period of investigation, both in total volume and as a percentage of imports. The plaintiffs assert that the commissioner relies on the wrong data in reaching his conclusion. The figure he cites as the potential unit production by unused capacity reflects both industrial and automotive belts and therefore a greater potential production than realistically exists for the former kind alone. The plaintiffs argue that only half the number cited by Commissioner Rohr is realistic<sup>17</sup> and then point out that only a percentage of that figure can be assumed to be directed at the U.S. market. Therefore, he wrongly calculated both the total number and the percentage thereof of potential production via unused capacity. Furthermore, the plaintiffs content that, when viewed independently, the exports of industrial belts paint a different picture than Commissioner Rohr's. They indicate that the trend, both in terms of exports to the United States as a percentage of total exports and as a percentage of total production, does not lend

<sup>17</sup> In their post-remand brief, they explain why capacity and capacity utilization data were reported as an aggregate. In support of their allocation of the percentage of the data which can be attributed to the production of industrial belts, they point to confidential document 44, p. 8-177, which provides data for the production of belts in 1988.

support for the commissioner's assertion regarding the change in Italian exports to the United States during the period of investigation. *See* Pirelli Plaintiffs' Post-Remand Brief, pp. 14-15. They note particularly that the change in exports from 1987 to 1988, the last year of that period, presents the least support for his conclusion. Further:

Commissioner Rohr recognized elsewhere in his remand determinations the obvious fact that the more recent data, at the end of the period of investigation, is especially significant. In discussing Japanese production data, [he] stressed that "the largest portion of this [change occurred] in the last year of the investigation."

*Id.* at 15, n. 6. The commissioner should therefore have placed greater weight on the export figures for 1987-1988 than for 1986-1987 "because [they] represent[ ] the most recent data, which is the most indicative of future trends." *Id.* at 15 (footnote omitted). The plaintiffs note that the overall change in Italian exports of industrial belts was "not as dramatic as Commissioner Rohr makes out." *Id.*

Suffice it to state that the commissioner's reference to the last year does not mean that a view as to the entire period of investigation is impermissible.

(2)

Commissioner Rohr considers there to be a likelihood that market penetration will increase injurious level. *See* Views on Remand at 12-14, 20-21. Regarding Japan, his analysis of the data recognizes that there is stronger support for this perception in the "All Other" category than for V-belts or synchronous belts. Considering that the domestic V-belt and synchronousbelt industries have been determined to be more susceptible to injury than the all-other segment, the corresponding relationship of the Japanese import penetration ratios is found by the commissioner to support an affirmative determination for all three categories.

After examining the import penetration ratios for Italy, Commissioner Rohr determines that the

level of market penetration in absolute terms, particularly in the V-Belt industry, provides only slight support for an affirmative, although as I have stated I must look at these in the context of the other imports that I found to be threatening the industry. The [changes] in the V-Belt and Synchronous categories provide relatively stronger support.

*Id.* at 13-14. The commissioner concludes that his original decision that the data provide support for an affirmative threat determination remains appropriate.

The Bando plaintiffs counter that current penetration by Japanese imports was not significant enough to support an affirmative present material injury determination. They argue that the conclusion that a continuing trend of changes in import penetration would become injurious is unsupported by the record and that, in fact, "the evidence that has

been presented actually points in the opposite direction, *i.e.*, to a decrease in import penetration levels in the future." Bando Brief at 18.

However, that import penetration ratios do not support a present material injury determination does not necessarily mean that they do not support a finding of threat of material injury. Evidence of present harm is not necessary for a finding that injury is threatened. *E.g.*, *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 52, 592 F.Supp. 1318, 1323-24 (1984). The purpose of examining current import penetration ratios is to determine the rate of increase, not necessarily the actual degree of penetration. Thus, for example, a very minor percentage of penetration which doubled from one year to another during the course of an investigation could portend future such increases which would materially injure the domestic industry. Moreover, as the defendant points out, Commissioner Rohr considered combined import penetration from Italy, Japan and Singapore for V-belts, and from Italy and Japan for synchronous belts. The combined data provide support for the commissioner's conclusion that market penetration may increase to injurious levels.

Bando asserts that, in not accepting the plaintiffs' stated intent to reduce further exports to the United States, Commissioner Rohr "failed to take into account 'whatever in the record fairly detracts from its weight.'" Bando Brief at 23, quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). However, the commissioner does consider, and then rejects, this intent. *See* Views on Remand at 25. Moreover, he was required only to consider evidence on the record and to render his determination based on a fair evaluation of that evidence. "Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record." *Rhone Poulenc, S.A. v. United States*, 8 CIT at 55, 592 F.Supp. at 1326.

The Pirelli plaintiffs take the position that, given the penetration levels, particularly for V-belts, "the likelihood that they would increase to injurious levels was remote at best, and the threat of injury was in no way 'real' and 'imminent.'" Pirelli Plaintiffs' Post-Remand Brief at 18. But the real-and-imminent standard applies to the threat of material injury perceived as a whole, not as to each individual factor considered. Commissioner Rohr does note in his views on remand that the level of import penetration from Italy provides only slight support for his affirmative determination and that, even combining the data, only moderate support is indicated. What is significant here, to repeat what has already been stated above, is that the trend in import penetration nevertheless supports an affirmative determination. The degree of that support is important only when determining whether the commissioner's determination, reviewed in its entirety, is supported by substantial evidence on the record. Indeed, as the plaintiffs themselves point out, import penetration data must be analyzed in light of other factors. *See id.* at 22-24.

The Pirelli plaintiffs criticize Commissioner Rohr's decision to examine combined import penetration figures, calling it "informal cumulation." *Id.* at 24. They point to his explanation in his original determination that he does not generally utilize formal cumulation in threat cases and also that he "did not note 'the impact of other unfairly traded imports' in his discussion of the Italian case." *Id.* at 25, citing public document 308, pp. 45-46. They call his decision, after remand, to consider the cumulative effect of imports "arbitrary and an abuse of his discretion". *Id.* at 27.

However, such an approach has been held permissible. *See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 634, 642, 693 F.Supp. 1165, 1172 (1988). Furthermore, if a commissioner were unable to revise his analysis on remand, that route following judicial review would be devoid of purpose. Finally, the figures for Italy standing alone provide support for the commissioner's determination, independent of the combined data. The court further notes that he analyzes cumulative data independently of his analysis of market penetration, choosing instead to categorize that analysis pursuant to 19 U.S.C. § 1677(7)(F)(i)(VII), to wit, "any other demonstrative adverse trends that indicate the probability that the importation \* \* \* of the merchandise \* \* \* will be the cause of actual injury."

(3)

In his analysis of Japanese pricing practices, Commissioner Rohr points out that he

did not place great weight on pricing information. I did not view it as particularly reliable because it was statistically based on a limited number of observations and subject to the problems detailed in the Commission's final report of this investigation. I note that it does consistently point in one direction, that of an affirmative finding which is also supported by the anecdotal evidence. While it does not have great weight, what weight the pricing data has [ ] must be added to the evidence supporting an affirmative determination.

Views on Remand at 22. Despite the commissioner's admission that this information provides but minimal support for his determination, the plaintiffs go to great lengths to refute the analysis. The court discerns little, if any, ground to be gained by discussing their contentions herein.

The situation with regard to Italy is similar, with the added difficulty that the pricing information requested by the ITC was not provided.

(4)

Commissioner Rohr examined inventory levels in Italy and Japan and concludes that they support his determination because "a build up of inventories of the imported materials \* \* \* could, for example, increase exports to the United States depressing or suppressing effect by overhanging the market." *Id.* at 15. He explains, in reaching his conclusion based on the Japanese data, large inventories "increase the level of supply available

to be shipped to the U.S. market, whether directly or by permitting diversion of the use of production facilities for the U.S. market." *Id.* at 23.

It is true, as the Pirelli plaintiffs point out, that the statute intends that the ITC consider inventory levels in the United States. However, the statute is not exclusive in its enumeration of factors to evaluate, and the ITC has in fact taken home-market inventory data into account before. *See, e.g., Citrosuco Paulista, S.A. v. United States, supra*, 12 CIT at 1224-25, 704 F.Supp. at 1099.

(5)

A topic Commissioner Rohr did not address in his original determination was Bando's contention that the opening of production facilities in the United States by it and another Japanese firm is evidence which strongly portends reduced imports:

\* \* \* It has been Plaintiffs' position throughout these proceedings that the commitment to the U.S. market represented by these new facilities – in terms of capital, personnel, marketing, and public relations – is concrete evidence of a reduced role for imports of industrial belts from Japan in the future.

Bando Brief at 32. The commissioner explains that he did consider the data relating to the new plants but "believed the allegations about displacement of imports to be too speculative". Views on Remand at 24. The plaintiffs claim that, far from being speculative, the two facilities had already begun operations by 1988. They point to their annual capacities as compared with the volume of imports from Japan and to the change in the number of belts exported to the United States from 1987 to 1988 as further support for their claim. *See* Bando Brief at 33-34.

Commissioner Rohr chooses not to rely on the "unsubstantiated allegations". Views on Remand at 24. Because the plants opened in the last year under investigation, the effect on future imports was not quantifiable. The commissioner finds that, "while the Japanese producers claimed that these new facilities would replace exports from Japan, there was no convincing evidence beyond their claims that this would in fact occur." *Id.*

### III

Reviewed as a whole, Commissioner Rohr's affirmative threat determination is supported by substantial evidence on the record and otherwise in accordance with law. That one or more of the factors considered may not support a finding of threat of material injury is not conclusive. *See e.g., Rhone Poulenc, S.A. v. United States, supra*, 8 CIT at 52, 592 F.Supp. at 1324 ("[I]n some cases, \* \* \* one or two factors may so persuade the Commission of threat of injury that the absence of one or another will be no bar to a finding of the requisite threat").

This is not to conclude that the plaintiffs have failed to bring forth cogent reasons in support of their mutual point of view that the power-transmission-belt industry in the United States is not threatened with real and imminent injury by reason of imports from Japan and Italy, re-

spectively. However, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). Commissioner Rohr, in expanding his original views after remand, shows that the affirmative determination he reaches has a reasoned basis. While the ITC has a duty to consider all the evidence before it, under the statute it is required to disclose only the findings and conclusions upon which the determination is based. *See* 19 U.S.C. § 1671d(d); *British Steel Corp. v. United States*, 8 CIT 86, 98, 592 F.Supp. 405, 414 (1984). The remand views of Commissioner Rohr now meet this requirement, and the court hereby concludes that the plaintiffs are not entitled to any additional relief on their respective motions for judgment on the ITC record and for partial summary judgment.

#### IV

As indicated in slip op. 92-26, the plaintiffs, in the interests of orderly procedure herein, have pursued primarily their claims against the ITC and Commissioner Rohr. However, they also complain of the ITA's *Antidumping Duty Order of Sales at Less Than Fair Value; Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Italy*, 54 Fed.Reg. 25,313 (June 14, 1989), and *Antidumping Duty Order of Sales at Less Than Fair Value; Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan*, 54 Fed.Reg. 25,314 (June 14, 1989), to the extent that suspension of liquidation occurred thereunder as of February 1, 1989, notwithstanding Commissioner Rohr's negative "but-for" determination, *supra*.

Other parties to the underlying antidumping proceedings appealed from similar resultant orders on the same ground. Those cases, docketed as CIT Nos. 89-07-00403 and 89-07-00404, led to final judgments in their favor, ordering the ITA to refund any deposits of estimated antidumping duties on imports of power-transmission-belts from Japan and Singapore entered between February 1 and June 7, 1989. *See MBL (USA) Corporation v. United States*, 16 CIT \_\_\_, 787 F.Supp. 202 (1992). The plaintiffs herein are similarly situated and thus entitled to same relief as against the ITA. Indeed, during the period of the remand to the ITC, Pirelli filed a consent motion for partial summary judgment on this issue.

In light of the foregoing affirmation of the ITC's determination after remand, the contingent relief requested by the plaintiffs against the ITA should now be granted.

Judgments will enter accordingly.

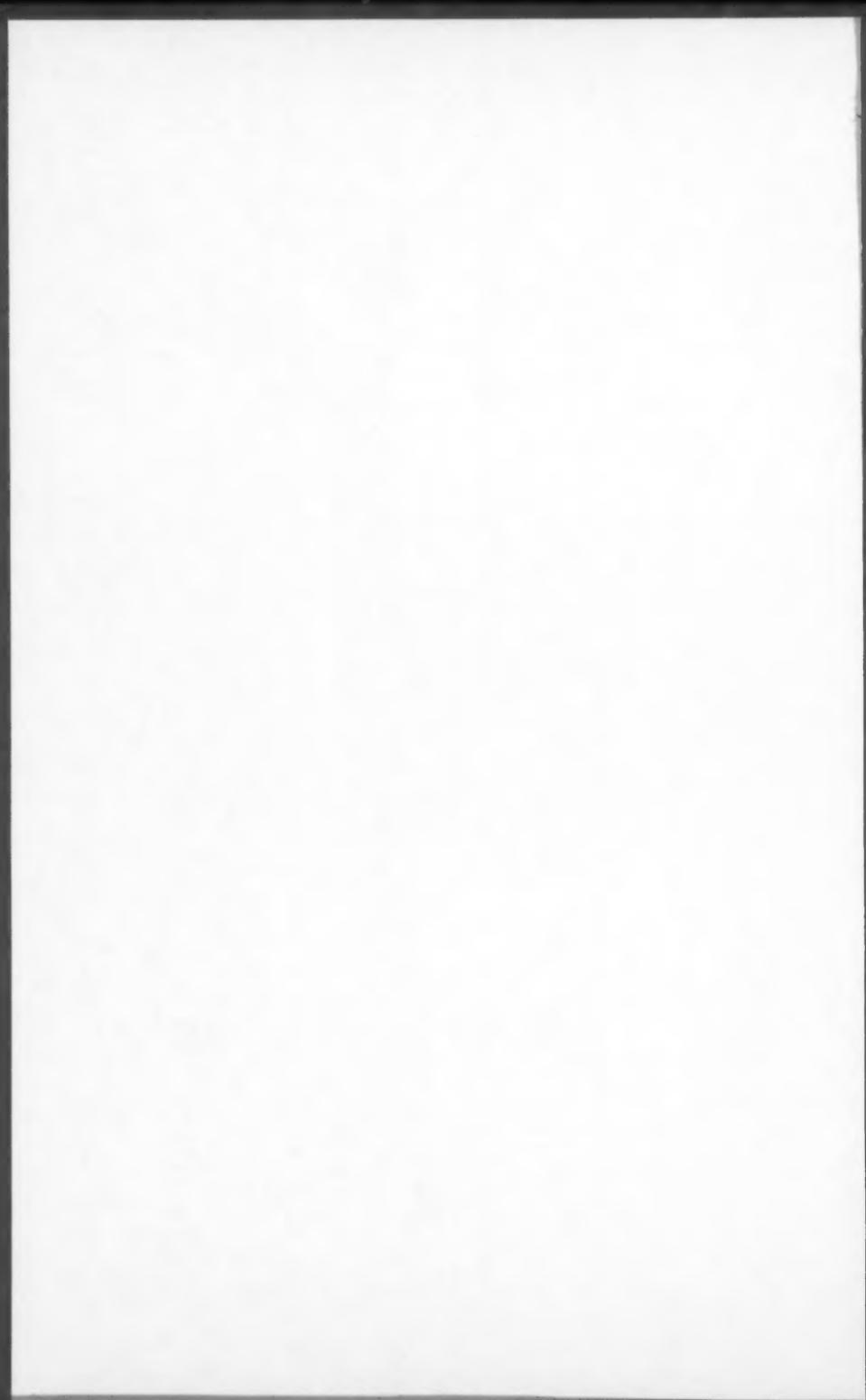
## ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
CB3/69 8/6/93 Aquilino, J.	Erika Inc.	90-04-00179	709.17 9018.90 70203 Various rates	870.67 981.100.96 Various rates (Some merchandise exemplified Sec. 24.23 of Customs Regulations (19 CFR 24.23) and Sec. 24.23 of Customs Regulations in accordance with Sec. 580(B)(8)(B), Title 19 U.S.C. (Sec. 9801 of P.L. 100-203.)	Agreed statement of facts	Newark, NJ Sterile hollow fiber dialyzers
CB3/90 8/4/93 DiCarlo, J.	Fashion Sports Apparel, Inc.	91-11-00791	6201.93.3510 29.5% and 6203.43.4010 29.7%	6211.33.0035 17% 6211.33.0030 17%	Agreed statement of facts	New York Men's lined jackets and trousers
CB3/91 8/6/93 Musgrave, J.	Fashion Sports Apparel, Inc.	92-03-00192	6201.93.3510 29.5% (jackets) 6203.43.4010 29.7% (trousers)	6211.33.0035 17% (jackets) 6211.33.0030 17% (trousers)	Agreed statement of facts	New York Men's lined jackets and trousers
CB3/92 8/6/93 Musgrave, J.	Fashion Sports Apparel, Inc.	92-04-00220	6201.93.3510 29.5% (jackets) 6203.43.4010 29.7% (trousers)	6211.33.0035 17% (jackets) 6211.33.0030 17% (trousers)	Agreed statement of facts	New York Men's lined jackets and trousers
CB3/93 8/6/93 Goldberg, J.	Ford Aerospace and Communications Corporation	91-05-00340	685.33 6%	688.42 3.9% 685.90 5.3%	Agreed statement of facts	San Francisco Bandpass filters and WG isolators
CB3/94 8/6/93 Carman, J.	Heraeus Amersil, Inc.	85-10-01402, etc.	548.05 11%	540.67 23.3% or 23.35%, etc. various rates	Agreed statement of facts	New York Retail, etc. or any other merchandise classified as optical glass under item 540.67

C93/95 8/4/95 Muaggrave, J.	Teradata Corp.	92-12-00816	847120.0080- 3.9%	847139.1500-8 Free of duty	Headquarters Ruling No. 500410 March 23, 1992
C93/96 8/4/95 Muaggrave, J.	TOPPCa International, Inc.	92-12-00806	847120.0080 3.9% 4202.92.9020 20% (computer carry bags)	847139.2000, etc. Free of duty	Agreed statement of facts







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